Combating the financing of terrorism together? The influence of the United Nations on the European Union's financial sanctions

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Combating the Financing of Terrorism Together? The Influence of the United Nations on the European Union's Financial Sanctions Regime

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7.1 Introduction

Since the devastating attacks of 11 September 2001 on the World Trade Center, international co-operation to combat terrorism has developed significantly both at the global and regional levels within bodies such as the United Nations (UN) and the European Union (EU) respectively (Cortright and Lopez, 2007; Spence, 2007; Weiss and Boulden, 2004). One of the most important dimensions of counter-terrorism is combating terrorist financing (CTF) (Acharya, 2009; Biersteker, Eckert and Romaniuk, 2008). While it has often been observed that the conduct of terrorist attacks does not necessarily require large amounts of money, it is generally acknowledged that the preparation of attacks and the other activities of terrorist groups – such as recruitment, training, propaganda, and the promotion of terrorist causes – necessitate higher levels of funding (Acharya, 2009; Clunan, 2007; Richard, 2005, 5–6). Preventing would-be terrorists from accessing funds is therefore a way to disrupt their activities and prevent future attacks (Gardner, 2007, 157). Focusing on the money trail left by terrorists also allows investigators to gather evidence against terrorists and to generate intelligence concerning terrorist groups (Bures, 2010, 419).

Terrorism can be funded legally or illegally (Acharya, 2009). Lawful or legitimate funds include money raised by charities, donations and the proceeds of other forms of fund-raising, whereas illegal funds refer to proceeds of criminal activities such as money-laundering, drug trafficking, and illegal arms trade. Such proceedings would be frozen or seized even if they were not destined to finance terrorism, in contrast to legal funds that can only be frozen or seized if it is intended that they should finance terrorism (Bantekas, 2003, 316).[1] In addition, terrorism can be funded by states or private actors. As there has been a significant decrease in the number of states financing terrorism over the last few years, the role of private actors in the financing of

terrorism has become increasingly important (Bantekas, 2003, 316; Clunan, 2007, 264). Terrorist financing can therefore be defined in broad terms, as it has been by the EU in the Third Anti-Money Laundering Directive[2] as 'the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences' that have been defined as terrorism.[3] The diversity of the actors and activities involved in terrorism is also reflected in the range of CTF measures, which address one or several phases(s) of the terrorist financing process ('raising funds, holding funds, moving or transferring funds, and dispersing funds to commit terrorist acts') (Biersteker, 2004, 64; see also Acharya, 2009; European Parliament, 2009). AQ1

In the EU, the terrorist attacks on 11 September 2001 have been a major catalyst for the development of the EU's CTF policy, although some CTF measures had already been adopted previously, such as sanctions against Usama Bin Laden. Several scholars have commented that the EU's CTF policy has been influenced to a significant degree by standards developed outside the EU (Bures, 2010; Heng and McDonagh, 2008). This chapter examines how the development of a major aspect of the EU's CTF policy, namely financial sanctions (or asset freezing) measures against suspected terrorists, has been influenced by the UN. Financial sanctions against individuals are measures that oblige states to (1) freeze the funds and other financial assets or economic resources of the targeted persons and (2) ensure that these persons do not have any direct or indirect access to other funds, financial assets or economic resources.[4] They are a category of the so-called targeted or smart sanctions, which have been developed since the 1990s in response to the acknowledgement that comprehensive sanctions placed upon states generally cause high levels of suffering among the population of the targeted country, often without achieving their main aims (van Thiel, 2008). However, the move from collective sanctions (against states) to targeted sanctions (against individuals) has caused specific problems, such as the difficulty for the targeted private entities or individuals to express their disagreement with the imposition of sanctions (see Almqvist, 2008; Draghici, 2009; Eeckhout, 2007; Flynn, 2007; Foot, 2007; Guild, 2008; Heupel, 2009; van den Herik, 2007; van den Herik and Schrijver, 2008; Vlcek, 2009).

The focus will now be on this specific component of the EU's CTF policy because of its importance in the overall EU's CTF policy, as well as the controversies that have surrounded it.[5] Also, as the present book seeks to explore various issues pertaining to the influence of international institutions over the EU as explained in the introductory chapter, this case was identified as an interesting case after a review of the existing literature, because of the likely existence of at least some degree of influence of the UN over the EU.[6]

This chapter is divided into four main sections. The first presents the development of the EU's financial sanctions regime, while the second shows

how it has been influenced by the UN, in particular the UN Security Council (UNSC). The third section examines the two main factors accounting for the influence of the UN over the EU in this policy area, namely a process of 'path-dependency' from previous sanctions regimes and the EU's declared commitment to multilateralism and international law. The next section highlights that, while the European Commission and the Council have appeared comfortable with the influence of the UN over the development of the EU's financial sanctions regime, the European Court of Justice (ECJ) has attempted to reduce such influence in a recent landmark ruling. Finally, the chapter offers some conclusions on the issue of the influence of the UN over the EU.

7.2 The EU's financial sanctions regime

Prior to the terrorist attacks on 11 September 2001, the EU had not adopted any specific provisions concerning the financing of terrorism. To a large extent, this only reflected the lack of development of its counter-terrorism policy more generally, which 'was more political than operational' (Romaniuk, 2010, 113). In that respect, the terrorist attacks on 11 September 2001 can be seen as a 'critical juncture' that led to a significant increase in EU co-operation on counterterrorism (Argomaniz, 2009; see also Kaunert, 2007; 2010a; 2010b; Kaunert and Della Giovanna, 2010; Peers, 2003). At the extraordinary European Council of 21 September 2001, terrorism was identified as one of the main challenges facing Europe and the world and, conversely, the fight against terrorism was defined as one of the EU's priority objectives. The action plan adopted on that occasion defined combating the funding of terrorism as a 'decisive aspect' and one of the five priorities of the EU's counterterrorism policy (European Council, 2001a, 2). More precisely, it called upon the ECOFIN and Justice and Home Affairs Councils to adopt the measures necessary to combat terrorist financing (European Council, 2001a, 2). The Action Plan also highlighted the importance for all member states to sign and ratify 'as a matter of urgency' the UN Convention for the Suppression of the Financing of Terrorism. Among the 46 measures identified in the Anti-Terrorism Roadmap that was adopted on 26 September 2001, two concerned terrorist financing (European Council, 2001b).[7] Combating terrorist financing ('to reduce the access of terrorists to financial and economic resources') was also identified as one of the seven 'New Strategic Objectives' in the combat against terrorism endorsed by the European Council and annexed to the Declaration on Terrorism adopted on 25 March 2004 (European Council, 2004). The 2004 EU Action Plan on Combating Terrorism also identified reducing the access of terrorists to financial and other economic resources as one of seven objectives of the EU's counter-terrorism policy (Council, 2004b). In order to organize more systematically activities in this policy area, a Strategy on combating the

financing of terrorism was adopted by the European Council in December 2004, before being substantially revised in July 2008 (Council, 2005a; Council, 2008). The EU instruments aiming to limit terrorists' access to financial and other economic resources are an important component of the so-called 'Pursue' strand of the EU's Counter-Terrorism Strategy of December 2005 (Council, 2005b).[8]

As previously mentioned, this chapter focuses on one of the main dimensions of the EU's CTF policy, namely financial sanctions against individuals suspected of involvement in terrorist activities. Before examining the evolution of the EU's financial sanctions regime, it is important to note that one of its main characteristics is its legal complexity. Until the Treaty of Lisbon came into force on 1 December 2009, one could have referred to the 'cross-pillar' character of this regime, as it involved various measures in the three pillars of the EU.[9] First of all, a common position was adopted under Articles 15 and 34 of the Treaty on European Union (TEU) to set the EU's general approach on the matter. It contained measures relating to foreign policy – such as the 'strategic decision' to adopt individual sanctions (Eckes, 2009, 44) – and police and judicial criminal matters – such as assistance in preventing and combating terrorist acts – that is, measures in the (now former) second and third pillars. Subsequently, a regulation instructing the European Community (EC) to implement the necessary operational measures was adopted in the (now former) first (EC) pillar. The measures discussed in this chapter were adopted under this institutional arrangement. As the Treaty of Lisbon has now abolished the three-pillar structure of the EU, it is no longer correct to describe EU asset freezing measures as 'cross-pillar' instruments, although those have remained rather complex from a legal standpoint.

With regard to its content, the EU's financial sanctions regime has two main components. The first comprises the measures that have been adopted to freeze the assets of the Taliban, Usama Bin Laden and his associates (i.e., Al Qaeda) in particular. The second relates to broader measures that provide for the freezing of the assets of individual terrorists and entities in general. The first asset freezing measures adopted by the EU were of the first type; they targeted the Taliban (Council Common Position 1999/727/CFSP of 15 November 1999) and Usama Bin Laden and the persons and entities associated with him (Council Common Position 2001/154/CFSP of 26 February 2001, repealed by Council Common Position 2002/402/CFSP of 27 May 2002) (Tappeiner, 2005, 103). As explained earlier, the EU asset freezing measures were two-tiered as they were based on both common positions and regulations. Thus, regarding the restrictive measures against the Taliban, Council Common Position 1999/727/CFSP was supplemented by Council Regulation EC 337/2000. The latter was replaced by Regulation EC 467/2001 once Common Position 2001/154/CFSP was adopted.

After adopting measures targeting the Taliban, Bin Laden and his associates in particular, the EU later adopted broader financial sanctions

targeting terrorists in general. In December 2001, the Council adopted a major package of four items, comprising two common positions, a regulation implementing the Community law aspects of the foreign policy part of one of the common positions, as well as a decision further implementing that regulation. Council Common Position on combating terrorism (2001/930/CFSP) outlined a series of actions to be taken by the EU to combat terrorism, including the freezing of the funds and other financial assets and economic resources of individuals and groups facilitating, attempting to commit or committing terrorist acts on the territory of the EU. Council Common Position 2001/931/CFSP contained more specific measures to combat terrorism. More precisely, it provided that, pursuant to Community law, the EC should order the freezing of the funds and other financial assets or economic resources of 'international' (i.e., non-EU) terrorists and ensure that those would not have access to alternative funds, financial assets, economic resources or financial or related services. This instrument also contained a definition of 'persons, groups and entities involved in terrorist acts', which was identical to that outlined in the Council Framework Decision of 13 June 2002 on combating terrorism, although the latter instrument had not been adopted following parliamentary reservations. In addition, Council Common Position 2001/931/CFSP required member states to strengthen judicial and police co-operation with respect to both 'international' and 'domestic' (i.e., EU) terrorists. There was an annex to this common position, which listed the persons, groups and entities 'involved in terrorist acts' who were targeted. This first version contained 29 persons and 13 groups and entities. This common position indicated that the list would be reviewed regularly and at least once every six months. As for the connected regulation (Council Regulation EC 2580/2001), it defined the 'funds' and assets to be frozen and laid down a detailed freezing procedure, while the decision connected to this regulation (Council Decision 2001/927/EC of 27 December 2001) listed the persons, groups and entities to which the aforementioned regulation applied. This first version of the list contained ten entries (eight individuals and two groups). Since then, it has been amended several times. Its most recent version at the time of writing contained 25 individuals and 29 groups and entities.[10]

It is important to note that the question of whether the Council had the competence to adopt these regulations – and thereby to develop and implement the EC policy against the financing of terrorism in practice – has been highly controversial. The Council based the regulations on Articles 60, 301 and 308 of the Treaty establishing the European Community (TEC). In the past, the Council had already adopted regulations containing sanctions targeting individual persons and entities on the basis of Articles 60 and 301. However, these sanctions only targeted persons holding official positions within the structure of a specific state, as well as their associates, such as the sanctions imposed by the EU upon Slobodan Milosevič and his family in the

late 1990s. Article 301 stipulated that the Council could 'take the necessary urgent measures' when 'it [was] provided, in a Common Position (…) for an action by the Community to interrupt or reduce (…) economic relations with one or more third countries'. Article 60 stated that 'in cases envisaged in Article 301 (…) the Council may in accordance with the procedure provided for in Article 301, take the necessary urgent measures in the movement of capital and in payments as regards the third countries concerned'. In the case of the asset freezing regulations under scrutiny in this chapter, the Council decided to supplement Articles 60 and 301 with Article 308 in order to be able to adopt sanctions against 'ordinary' individuals who did not necessarily hold any official position in a given country. Article 308 enabled the Council to take the appropriate measures to 'attain, in the course of the common market, one of the objectives of the Community' in any case where 'the Treaty [had] not provided the necessary powers'.

However, several scholars have criticized this reasoning and have argued that even a combined reading of these three articles did not give the EC the competence to adopt these asset freezing regulations. It is generally agreed that Articles 301 TEC and 60 TEC did not constitute an adequate legal basis for the adoption of sanctions against individuals (Andersson et al., 2003, 120; Eckes, 2009; Tridimas and Gutierrez-Fons, 2008–9). Supplementing Articles 60 and 301 with Article 308 was not sufficient to allow the EC to adopt the regulations either, because Article 308 only concerned situations where an objective of the Community was at stake. There was no objective of the Community at stake in the case of these asset freezing regulations, as their main objective – the attainment of international peace and security – was, technically, not an objective of the Community, but one of the EU (Andersson et al., 2003, 120; Eckes, 2008, 79). Thus, it is important to note that, for several scholars, the EC did *not* have the competence to adopt these regulations organizing asset freezing. This has been implicitly confirmed by the drafters of the Treaty of Lisbon. Indeed, this treaty contains two articles that have, for the first time, explicitly granted the EU the competence to adopt asset freezing measures against individuals (Eckes, 2009, 121–4).[11]

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7.3 The influence of the UN over the EU's financial sanctions regime

Having examined the development of the EU's financial sanctions regime for counter-terrorism purposes, it is now possible to examine the extent to and the ways in which it has been influenced by the UN. One can start by observing that, as for the EU, the UN's role in countering terrorism had traditionally been limited prior to the terrorist attacks on 11 September 2001, mainly as the result of the absence of international consensus on a definition of terrorism (Boulden, 2008). The most significant development in that period had arguably been the establishment of the ad hoc

Committee on Terrorism by the General Assembly in 1996, whose work led to the adoption of several terrorism-related Conventions, including the International Convention for the Suppression of the Financing of Terrorism in 1999 (Rosand, 2003, 333). Nevertheless, such international instruments did not have any significant impact because of the slow pace at which UN member states have tended to ratify and implement them (Acharya, 2009; Ward, 2003).[12] However, this considerably changed in the aftermath of the terrorist attacks on 11 September 2001 when 'the Security Council became the focal point of discussions and the forum for the adoption of measures against terrorism' (Bantekas, 2003, 315; see also Dhanapala, 2005). The following analysis of the UN's influence on the EU's policy therefore focuses on the role of the Security Council in this process. Before proceeding further, it is worth recalling that the EU itself is not a member of the UN, while all its member states are. In addition, two EU member states, namely France and the United Kingdom, belong to the five permanent members of the UNSC, where they are joined by other EU member states on a non-permanent, rotating basis.

It can be argued that the influence of the UN on the development of the EU's asset freezing regime has been high. The duality of the EU's financial sanctions regime, which can be divided between the measures that specifically target the Taliban, Usama Bin Laden and his associates on the one hand and the measures targeting terrorists in general on the other, find its very origin in and perfectly mirrors the duality of the UN's financial sanctions regime.

7.3.1 The influence of UNSC Resolution 1333[13]

With regard to the first dimension of the EU's asset freezing regime that concerns the measures targeting the Taliban and Bin Laden and his associates (i.e., Al Qaeda), it can be argued that the influence of the UN on the EU policy has been particularly high and far-reaching. Indeed, Common Position 2001/154/CFSP,[14] which provides for the freezing of the funds and financial assets of Bin Laden and his associates, has been mainly adopted by the EU in order to ensure the implementation of UNSC Resolution (UNSCR) 1333, which notably decided that all UN member states should freeze the funds of Usama Bin Laden and individuals and entities associated with him and should ensure that no other funds or financial resources should be made available to them. This resolution was adopted under Chapter VII of the UN Charter, which meant that its provisions were binding on all UN member states.[15] Council Common Position 2001/154/CFSP makes numerous references to UNSCR 1333, as well as to the UN Sanctions Committee. Article 4 states that '[funds] and other financial assets of Usama Bin Laden and individuals and entities associated with him *as designated by the UN Sanctions Committee* will be frozen, and funds or other financial resources will not be made available to Usama Bin Laden and individuals or entities

associated with him *as designated by the UN Sanctions Committee, under the conditions set out in UNSCR 1333 (2000)'* (emphasis added). Thus, it is remarkable that the EU asset freezing measures concerning Bin Laden and his associates are directly and entirely based on a list drawn up by the UN Sanctions Committee, which is accepted by the EU without any amendment. This is a case of far-reaching influence of the UN over the EU in the development of the financial sanctions that target Bin Laden and his associates.

Given the importance of the list drawn up by the Sanctions Committee for the EU's financial sanction measures targeting Bin Laden and Al Qaeda, it is worthwhile briefly examining this committee and is activities. The Sanctions Committee – also known as the '1267 Committee'[16] – was initially established by UNSCR 1267 in 1999. This resolution was a front-runner to UNSCR 1333, as it imposed sanctions on Taliban-controlled Afghanistan for supporting Bin Laden and Al Qaeda, namely a flight ban and asset freezing measures (Rosand, 2004, 747). The committee comprises the 15 members of the Security Council (Stromseth, 2003, 41). It was initially tasked with monitoring the implementation of the sanctions by UN member states. Following the adoption of UNSCR 1333, the committee was also asked to draw up and subsequently update the list of individuals and groups associated with the Taliban, Bin Laden and Al Qaeda, whose assets were to be frozen. However, in particular at the beginning, the work of the committee was characterized by a high level of '*ad hoc-ism*', since it 'did not even have specific standards to guide states in proposing names for designation' (Mendelsohn, 2009, 115). According to Rosand (2004, 748–9),

> During the committee's initial period of work, the creation of the list was based largely on political trust (…). [In] practice, submissions of names to the 1267 Committee often contained minimal personal information and did not generally include explanations of the connection between the individual or entity and Osama bin Laden, or members of Al Qaeda and the Taliban. This approach was justified by the need to protect secret intelligence material and sources, from which the names are usually derived, and by the desire to include suspected bad actors on the list as soon as possible.

Following the terrorist attacks on 11 September 2001, the willingness of many governments to show their support to the United States in the face of the terrorist threat (Rees, 2004, 176; Wilkinson, 2008, 8) led to the inclusion of more than 200 names on the list, most of them following submissions from the United States (Rosand, 2004, p. 749). Among those were three Somali-born Swedish citizens, who were allegedly involved with the Al Barakaat financing network. After becoming convinced that the men had been wrongly listed, the Swedish government managed to negotiate the removal of two of them from the 1267 Committee list (Heupel, 2009,

310). Following this episode, which had highlighted the serious shortcomings stemming from the lack of clear listing and delisting procedures, the 1267 Committee adopted a set of written guidelines regarding the inclusion and removal from the committee's list in November 2002 (Tappeiner, 2005, 102). However, although the introduction of written guidelines represented an improvement, it is widely considered that the blacklisting procedures applied within the 1267 Committee are still affected by several shortcomings, most notably with regard to the respect of human rights standards (Almqvist, 2008; Draghici, 2009; Rosand, 2004).

As explained earlier, these controversies have not prevented the EU from taking swift action in order to implement UNSCR 1333. Any subsequent changes to the 1267 Committee list of suspected terrorists have been faithfully transcribed into Community law. Thus, it has been tacitly accepted that the EU should impose sanctions against individuals and entities that have been listed by another body, namely the 1267 Committee, in non-transparent conditions. Given the controversies surrounding the work of the 1267 Committee, this high degree of influence of the UN over this component of the EU's financial sanctions regime is particularly striking.

7.3.2 The influence of UNSCR 1373

Council Common Position 2001/931/CFSP of 27 December 2001 has also been adopted by the EU with the specific aim of implementing a UN Security Council Resolution, namely UNSCR 1373, which was passed on 28 September 2001. This resolution, described by Rosand (2003, 333) as the 'cornerstone of the United Nations' counterterrorism effort', requires all UN member states to strengthen various aspects of their counterterrorism policies, although it actually does not define 'terrorism' (Stromseth, 2003, 43). As it has been adopted under Chapter VII of the UN Charter, the counterterrorism measures that it contains, including CTF measures, are binding on all the UN member states. UNSCR 1373 notably declares that all states should prevent and suppress the financing of terrorist acts, criminalize activities aiming to fund terrorism, freeze the resources of terrorists and prevent funds being made available to them. It also decided that all member states should assist each other in criminal investigations and criminal proceedings relating to the financing of terrorism. Thus, the resolution comprises various measures that were hitherto only part of international conventions and protocols, such as the Terrorism Financing Convention, which thereby became binding on all the members of the UN – rather than just on those that had chosen to become parties to these international instruments (Eling, 2007, 107; Rosand, 2003).[17]

According to Talmon (2005, 175), this resolution was 'hailed as a "groundbreaking resolution", a "landmark decision", a "historic event" and even "one of the most important resolutions in [the] history [of the Council]"' by several state representatives on the UNSC. What was remarkable about

this resolution was the general and abstract character of the requirements imposed upon member states, which has been interpreted by observers as a rare example of international law-making by the UNSC. Rather than taking discrete action targeting a specific state, the Security Council adopted requirements that were placed on states for an indefinite number of cases and for an indefinite period of time, which is the hallmark of international legislation (Talmon, 2005). While some considered this development to be positive in the fight against terrorism (see, for example, Szasz, 2002), other observers were more circumspect or even critical. They considered that the UNSC should not act as a 'world legislator' and that its activities under Chapter VII should be limited to specific situations (see Alvarez, 2003; Olivier, 2004).

The strong character of the obligations placed upon UN member states was also reinforced by the fact that UNSCR 1373 established a Committee tasked with the monitoring of the progress of UN member states in implementing the resolution (Cortright et al., 2007). This Committee, which is known as the Counter-Terrorism Committee (CTC), comprises the 15 members of the Security Council and has come to be seen as the 'core of the Council's broad based counter terrorism strategy' (Boulden, 2008, 614). The Committee has three sub-committees, each of which monitors the progress accomplished by a specific group of states in the implementation of their counter-terrorism obligations. It is important to note that the main roles of the CTC are to monitor the implementation of UNSCR 1373 and to increase the capabilities of states to fight terrorism. It is not a sanctions committee (Dhanapala, 2005, 19) in the sense that it does not compile lists of terrorist persons or entities itself (Tappeiner, 2005, 101). UNSCR 1373 called upon states to report on their implementation of the resolution to the CTC within 90 days and thereafter according to a timetable to be set by the Committee. In order to emphasize the political importance of UNSCR 1373, the EU presented a common report on its implementation, alongside the national reports of all the EU member states. The report was drafted jointly by the Council and the Commission, before being submitted by the Presidency of the Council to the Chairman of the CTC in December 2001 (Eling, 2007, 111–12). A second joint report was presented to the CTC in August 2002. The EU had no obligation to do so, as it not a member of the UN, but it aimed to demonstrate its commitment to multilateralism and the importance of the role of the UN in the 'War on Terror', as will be further explained later.

The fact that the UN was laying down the requirement for all UN member states to impose financial sanctions upon suspected terrorists without providing any lists identifying such individuals presented a significant challenge to the EU. Rather than taking over a list of suspected terrorists such as that established by the 1267 Committee, it had to autonomously list those that would be the target of the financial sanctions (Cameron, 2003; Eling, 2007, 108). A new body, described as an '*ad hoc* forum' (Council, 2007, 1), was established

for that purpose, the so-called 'Clearing House'. It comprised representatives of the Council Secretariat, the Commission and the member states (Heupel, 2009, 316) and handled all the preparatory work concerning the listing and delisting of individuals, while formal decisions on listing and delisting were unanimously adopted by the Council (Heupel, 2009, 316–17). In 2007, it was decided to replace the 'Clearing House' with a formal Council Working Party, namely the 'Working Party on the implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism' (also known under the acronym 'CP 931 WP') (Council, 2007).

Thus, in the case of the EU's general financial sanctions regime, one can also identify a high degree of influence exercised by the UN. The EU has adopted a legislative arsenal and has established new institutional structures – the 'Clearing House', later replaced by the CP 931 WP – in order to implement UNSCR 1373.

7.4 Explaining the influence of the UN over the EU's financial sanctions regime

As the EU is not a member of the UN and is therefore not itself subject to the UNSCRs, from the standpoint of international law, the EU was not required to adopt the various common positions and regulations pertaining to CFT that have been discussed earlier (Eckes, 2009; Lavranos, 2006, 479). In addition, although the European treaties contain some references to the UN, it is generally agreed that those are not sufficient to argue that UNSCRs have binding force on the EU from the standpoint of European law either (Eckes, 2009).[18] Even more importantly, as argued earlier, and although the European Courts have construed a Community competence for political and pragmatic reasons (Eckes, 2009; De Sena and Vitucci, 2009), some legal experts have convincingly argued that the Community did not even have the legal competence to adopt sanctions against individuals (see, for example, Eckes, 2009; Tridimas and Gutierrez-Fons, 2008–9). In other words, the EU was neither required nor legally enabled to adopt asset freezing measures in order to implement the UNSCRs.

However, in practice, the Commission and the Council[19] showed their commitment to implement the UNSCRs at the EU level and efficiently worked together to rapidly adopt EU financial sanctions against terrorist suspects. In adopting such measures, they enabled the UN to exercise a very significant degree of influence over the EU's own asset freezing policy. There are two main factors that account for that outcome: (1) 'path-dependency' from more traditional sanction measures that had been previously adopted by the EU against states and (2) the EU's declared commitment to multilateralism and international law, which led it to attempt to appear as an 'exemplary implementer' of the UNSCRs concerning sanctions against individuals.

First of all, it can be argued that 'path-dependency' from previous EU sanction regimes against states can account to a significant extent for the EU's eagerness to adopt the financial sanctions against terrorist suspects that have been previously examined in order to implement UNSCRs. 'Path-dependency' refers to the idea that 'there are self-reinforcing processes in institutions that make institutional configurations, and hence their policies, difficult to change once a pattern has been established' (Peters, Pierre and King, 2005, 1276; see also Pierson, 2000). In other words, there tends to be a replication of institutional configurations, and thereby policy outputs, over time (although during 'formative moments' new priorities may emerge, which will lead to institutional and policy changes). With regard to the case examined here, as mentioned before, the EU had developed the practice of systematically 'transcribing' UNSCRs establishing sanction measures into EU instruments (as well as EC instruments for economic sanctions). As Eling puts it (2007, 114), '[for] the EU, effective implementation of UN Security Council resolutions imposing restrictive measures is an article of faith, predating 9/11 and, indeed, independent of whether a resolution targets terrorist suspects or, say, individuals impeding the peace process in Côte d'Ivoire'. In addition to its commitment to multilateralism, one of the main reasons for which the EC has consistently implemented the UNSCRs imposing economic and financial sanctions, which traditionally targeted states, is the fact that it has exclusive competence with regard to external trade matters (former Article 133 TEC) (Eling, 2007, 108; Lavranos, 2006, 472). This implementation process was even formalized by the Treaty of Maastricht, which entered into force in 1993. It introduced a two step-procedure – first, the adoption of a common position or joint action on the basis of Article 14 TEU or Article 15 TEU within the framework of the Common Foreign and Security Policy (CFSP), before the adoption of operational measures, usually in the form of a regulation, on the basis of Article 301 TEC, as well as Article 60 TEC in the case of financial sanctions (Lavranos, 2006, 472).

As previously mentioned, institutionalist scholars have argued that policy-making systems tend to replicate institutional configurations, which leads to 'path-dependencies'. From that viewpoint, although the sanctions established by UNSCR 1333 and UNSCR 1373 were qualitatively different in that they targeted individuals, rather than states, the EU approached them in the same manner as it had approached previous sanction measures adopted by the UN and set to implement them in an almost identical fashion. It followed the aforementioned two-step procedure that had been established for the implementation of UN sanctions against states, with a slight change that has been mentioned before, namely the addition of 'residual competence' Article 308 as a legal basis. In the case of the sanctions against the Taliban, Bin Laden and Al Qaeda, path-dependency was strongly facilitated by the fact that these sanction measures were initially 'traditional' sanction measures taken against the state of Afghanistan when the Taliban were still in

government. Indeed, Common Position 2001/154/CFSP builds upon a series of Common Positions, including Common Position 96/746/CFSP concerning the imposition of an embargo on arms, munitions and military equipment on Afghanistan, which were themselves adopted to implement UNSCRs.

In addition to path-dependency from previous sanction measures against states, another important factor accounting for the eagerness of the EU to adopt financial sanctions against terrorist suspects in order to implement the UNSCRs is the EU's declared commitment to multilateralism and international law. This has been stated by the EU on numerous occasions, including in the Commission Communication on 'The European Union and the United Nations: The choice of multilateralism' (Commission, 2003), which was endorsed by the European Council in December 2003 (Council, 2004a). The European Security Strategy (European Union, 2003, 9) – a highly visible and politically important document – also emphasized the commitment of the EU to 'effective multilateralism' and 'to upholding and developing international law', while identifying the 'strengthening of the United Nations' as a 'European priority'. Therefore, it was important for the EU to support the United Nations' actions against terrorism to reinforce the multilateral dimension of the 'War on Terror', especially once the United States showed increasing signs of unilateralism, in particular with regard to military counter-terrorist activities. Also, as a preference for multilateralism and a commitment to international law are important elements of the identity that the EU seeks to project on the international stage (de Búrca, 2010, 45; Manners, 2002; Manners and Whitman, 1998; Manners and Whitman, 2003), it was important for the EU to appear as a 'good implementer' of the UNSCRs concerning the freezing of the assets of terrorist suspects. This concern was heightened by the fact that UNSCR 1373 had also established the CTC in order to scrutinize the actions taken by UN member states in order to implement it. As emphasized by Eling (2007, p. 112), '[in] the early days of the CTC (…) the possibility of some form of enforcement action by the Security Council aiming at those states that did not implement crucial provisions of the resolution did not seem entirely far-fetched', such were the political significance and the priority given to UNSCR 1373 by the United States and its allies, such as the EU. From that standpoint, the adoption of EU financial sanctions in application of the UNSCRs can also be seen as an attempt by the EU to assist those member states that did not have any asset freezing arrangements in place to ensure that they would meet their obligations under the UNSCRs (Eling, 2007, 108; Howell and Co, 2007, 28).

7.5 A brake on the UN's influence over the EU's financial sanction regime: the role of the European courts

While the Commission and the Council – which had successfully pushed for the implementation of the UNSCRs at the EU level (see also Kaunert

and Della Giovanna, 2010), were priding themselves for the swift development of the EU's financial sanctions for counter-terrorism purposes, the European Court of Justice (ECJ) adopted a more critical stance. The most important of its rulings in that respect is that in the appeal decision in *Kadi* (Case C-402/05) *and al Barakaat* (Case C-415/05) in 2008,[20] which followed the controversial ruling by the Court of First Instance (CFI)[21] in the cases of *Yusuf* and *Al Barakaat International Foundation* (Case T-306/01) and *Kadi* (T-315/01) in 2005. Mr Kadi and Al Barakaat International Foundation were among the persons and entities who had been placed on one of the EU lists of terrorist suspects whose assets should be frozen by the EU member states without delay, as a result of their being included in the 1267 Committee list of suspected terrorists. It is outside the scope of this chapter to consider these various rulings in detail, as they deal with various complex legal issues. They have also proved controversial and have given rise to vigorous scholarly debates, in particular among law specialists.[22] This section only aims to examine briefly what the European judicial courts ruled in relation to the matter that concerns us in this chapter, namely the influence of the UN over the EU in the field of financial sanctions against individuals.

The first point to consider is that both the CFI and the ECJ found the Community competent to adopt financial sanctions against individuals suspected of involvement in terrorist activities.[23] This is significant as, had the courts found that the EU did not have the competence to adopt the asset freezing regulations examined before, they would have been annulled. The UNSCRs would then have had to be implemented by the EU member states without any measures being taken at the EU level. This would have meant that the UN would no longer have exercised the influence over the EU's financial sanction measures that it has to date. It is interesting to note that the CFI and the ECJ 'construed a Community competence for individual sanctions' in '(very) different ways' (Eckes, 2009, 125). While several observers found the reasoning of both European courts on this point rather unsound from a legal point of view, it was also acknowledged by some that this 'pragmatism' had 'avoided much tension' and had allowed 'the [EU] political institutions (…) to comply with the necessities of the international co-operation in the fight against terrorism' (Eckes, 2009, 125; see also De Sena and Vitucci, 2009).

In contrast, the rulings reveal that both courts were not in agreement on the issue of the extent to which the UN should be able to exercise influence over the EU. Evidently, the question was not phrased in those terms by the CFI and the ECJ, but rather in terms of the relationship between the UN's legal order and the Community's legal order. While the applicants were requesting the annulment of the EC regulations on the freezing of assets in so far as they concerned them on the grounds that those breached their fundamental rights, the CFI considered that such financial sanction measures fall outside the scope of judicial review for the most part when they are

required by UNSCRs. This was a remarkable stance given that the Court was asked to examine a regulation, which is clearly an act of the institutions that it is competent to review (Eeckhout, 2007, 184–5). The CFI mainly justified its position by arguing that any examination of the internal lawfulness of the instruments adopted by the EU to give effect to UNSCRs would amount to an evaluation of the UN lists of terrorist suspects, which evidently falls outside the scope of the CFI's jurisdiction. In other words, the CFI affirmed that obligations under the UN Charter prevail over European law and that, as a matter of principle, Community acts implementing obligations under the UN Charter fall outside the scope of the CFI's jurisdiction.[24] Thus, this ruling of the CFI confirmed the strong influence of the UN over the EU with respect to financial sanctions against individuals. According to the Court, the EU does not have any latitude in adopting sanctions against those previously identified as suspected terrorists by the 1267 Committee. This ruling by the CFI was sharply criticized by legal experts on several grounds, including the limitations that it put on the protection of human rights (see notably Wessel, 2006).

It therefore came as no surprise that the ECJ set aside the CFI's ruling on appeal in September 2008. It is not the place to consider in detail the various legal points examined in the ruling. The most important point with regard to the topic examined in this chapter is that the ECJ ruled that the European courts have jurisdiction to review the measures adopted by the Community in order to give effect to UNSCRs, such as the regulations concerning financial sanctions against suspected terrorists. The ECJ emphasized that the European courts are competent to review whether any Community measure respects fundamental rights. In particular, the ECJ stated in paragraph 285 of its judgment that

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

Thus, the ECJ decided to highlight the autonomy of the Community's legal order *vis-à-vis* the international order. As Nollkaemper (2009, 863) put it, '[the] ECJ positioned itself as a court of a quasi-domestic legal order autonomous from the international legal order, and prioritized its constitutional rights over the commands of the Security Council'. With regard to the matter of the influence of the UN over the EU, this ruling evidently aimed to limit the UN's influence by emphasizing that all the instruments adopted to implement UNSCRs can be subjected to full review under the human rights standards of Community law. This means that, if the European courts find

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that some of the fundamental rights of a person included in the EU lists have been breached, they may[25] be removed from these lists. In the case of the financial sanctions regime against the Taliban, Usama Bin Laden and Al Qaeda, this would therefore lead to a divergence between the 1267 Committee list of suspected terrorists and that used by the EU. Such a scenario shows that the ECJ ruling has limited the influence that the UN can exercise over the EU in the case of the financial sanctions against suspected terrorists.

This ECJ judgment has been received with mixed reactions. Some observers have welcomed the argument made by the ECJ that a violation of fundamental rights cannot be justified by the fact that it is caused by measures adopted in a wider security context, such as UNSCRs (Halberstam and Stein, 2009; Kunoy and Dawes, 2009; Tridimas, 2009). Some have positively received the emphasis put by the ECJ on the autonomy and the constitutional character of the EC legal order (d'Aspremont and Dopagne, 2008). However, others have been more critical of the ruling. Some have criticized the ECJ for, in their view, disregarding international law and the UN Charter in particular (Goldsmith and Posner, 2008; Hinojosa Martínez, 2008), or at least 'indulging in (…) *ad hoc*, instrumentalist engagement with international law' (de Búrca, 2009, 862). According to de Búrca (2009), in recent years, the ECJ has increasingly emphasized the autonomy of the EC's legal order in rulings relating to international relations. In her view (de Búrca, 2010, 49), this emphasis on the constitutional nature of the Community's legal order and its separation from the international legal order, including the UN, 'has potentially significant implications for the image the EU has long cultivated of itself as an actor which is committed to "effective multilateralism", professing a distinctive allegiance to international law and institutions and seeking to carve out a global role for itself as a normative power'.

There is little doubt that there will be further judgments by the European courts concerning the EU's financial sanctions against suspected terrorists. Those are likely to address some of the doubts that have been expressed as to the consistency of the ECJ's ruling in the *Kadi* and *Al Barakaat* cases with international law and the European treaties. It is interesting to observe at the moment that the ECJ has rejected the idea of allowing the UN to exercise a high degree of influence over the EU – as it would have done if it had accepted that measures adopted to implement UNSCRs cannot be reviewed in the light of fundamental rights. However, this emphasis on judicial review and the respect of fundamental rights, which has been welcomed by some, has been criticized by others for putting the role of the EU as a 'good implementer' of UNSCRs into question. Thus, while the Commission and the Council have agreed to let the UN exercise a high degree of influence over the EU's financial sanctions regime, mainly because of the EU's pro-multilateralism stance, the ECJ has sought to limit the influence of the UN over the EU by reaffirming the autonomous character of the Community's legal order.

7.6 Conclusion

This chapter has examined the influence exercised by the UN over the development of the EU's financial sanctions against suspected terrorists. It has shown that the UN has exercised a high degree of influence over the EU in this policy area, especially with regard to the financial sanctions that have been imposed upon the Taliban, Bin Laden and Al Qaeda. This is particularly remarkable given that the UNSCRs concerning financial sanctions against suspected terrorists are not directly binding on the EU, as it is not a member of the UN, but only on the EU member states. Referring to the theoretical framework developed earlier in this book, this can be identified, overall, as a case of *transformation*. This is evidenced by the adoption of a substantial number of EU instruments setting up financial sanctions, as well as the emergence of new institutional structures, such as the 'Common Position 931 Working Party', which has replaced the more informal 'Clearing House'. This chapter has argued that there have been two main factors accounting for the UN's influence: (1) a path-dependency process from previous state sanctions and (2) the EU's declared commitment to international law and multilateralism. It has also been noted that, while the efficient co-operation between the Commission and the Council to implement the relevant UNSCRs has shown their broad acceptance of the UN's influence in this policy area, the ECJ has proved to be significantly less amenable to it. In a landmark ruling in the *Kadi* and *Al Barakaat* cases, the ECJ has sought to limit the influence of the UN over the EU by reaffirming the autonomy of the Community's legal order from the UN's legal order. From that standpoint, and again with reference to the theoretical framework underpinning this book, it can therefore be argued that the ECJ is engaged in a process of *retrenchment*. Thus, in contrast with the literature that argues that the institutions enabled to significantly constrain behaviour are able to exercise a greater degree of influence, as explained in the introductory chapter, the present case has shown that strong constraints can actually provoke a backlash and a certain degree of resistance to what is perceived as too high an influence from an international institution. However, it is important to emphasize that the issue of the influence of the UN over the EU's financial sanctions regime is not settled yet and is still characterized by a significant level of controversy and uncertainty. It is highly likely that there will be other judgments by the European courts regarding the EU's financial sanction measures against suspected terrorists. In turn, those will have a significant impact on the broader issue of the influence of the UN over the EU.

Notes

1. Money laundering activities and the financing of terrorism are linked, which explains why some measures target both challenges at the same time.

2. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money-laundering and terrorist financing.
3. The EU has defined 'terrorism' in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.
4. Actually, from a technical point of view, the freezing of funds is not a sanction, as it is a preventive measure that does not rely upon criminal standards (della Cananea, 2009, 514). However, since their inception, asset freezing measures have been widely referred to as 'sanctions' by national governments, the EU, the UN and scholars alike. Therefore, this chapter adopts the same approach and uses the term 'sanction'.
5. This chapter is strictly concerned with the freezing of assets, which should be distinguished from the confiscation of assets. With regard to the confiscation of assets, the European Union has adopted two main Framework Decisions. The first was Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, which was adopted on 24 February 2005 and which stipulates that member states should confiscate 'either wholly or in part, property belonging to a person convicted of an offence (…) which is covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism'. The second significant Framework Decision was Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders, which included provisions concerning the execution by a member state of a confiscation order issued by a Court of another member state.
6. It is fully acknowledged that the activities of the Financial Action Task Force (FATF) have also influenced the development of the EU's CTF policy (see Bures, 2010). However, it is not possible to include them in the present analysis due to space constraints.
7. The first of these measures called EU member states to sign and ratify the UN Convention on the financing of terrorism urgently (measure 26). The second called a Joint JHA/ECOFIN Council to rapidly take measures against non-cooperative countries and territories identified by the FATF in the light of the fight against terrorism (measure 31) (European Council, 2001b).
8. The EU's Counter-Terrorism Strategy is based on four pillars: 'prevent', 'protect', 'pursue' and 'respond'. 'Prevent' refers to activities aiming to tackle the root causes of terrorism, while 'protect' concerns activities aiming to decrease the vulnerability of people and infrastructures to terrorist attacks. 'Pursue' refers to the investigation of terrorist activities, while 'respond' concerns the reactions to terrorist attacks (Council of the European Union, 2005b).
9. Following the entry into force of the Treaty of Maastricht in 1993, which established the EU, there used to be three so-called pillars, namely the EC or 'Community' pillar for matters related to the single market, the Common Foreign and Security Policy (CFSP) pillar for foreign and external security matters, and the Justice and Home Affaire (JHA) pillar for internal security matters. The EC had legal personality, whereas the EU did not. The Treaty of Lisbon abolished the three-pillar structure of the EU (and thereby the EC). Only the EU remains now, which has also been granted legal personality. For the sake of simplicity, this chapter generally refers to the EU, unless it is necessary to distinguish between the EC and the EU for technical reasons.
10. Council Implementing Regulation (EU) No 1285/2009 of 22 December 2009 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive

measures directed against certain persons and entities with a view to combating terrorism and repealing Regulation (EC) No. 501/2009.

11. Article 215 of the Treaty on the Functioning of the European Union (TFEU) (which replaces Article 301 TEC) constitutes the legal basis for the financial sanctions against individuals that have been placed on UN lists, such as the list drawn up by the 1267 Committee, while Article 75 TFEU (which replaces Article 60 TEC) provides a legal basis for the sanctions against individuals that are autonomously listed by the EU.
12. For example, according to Ward (2003), only two states – Botswana and the United Kingdom – had ratified all 12 international instruments aiming to combat terrorism by the time of the terrorist attacks on 11 September 2001.
13. Other UNSCRs, such as UNSCRs 1390 and 1455, subsequently confirmed that the freezing of the assets of the Taliban, Bin Laden and Al Qaeda should be continued. However, UNSCR 1333 is the most important as it established the financial sanction measures against Bin Laden and Al Qaeda.
14. This common position complements previous common positions setting out restrictive measures against the Taliban, such as Common Position 96/746/CFSP and Common Position 1999/727/CFSP.
15. UNSCRs adopted under Chapter VII of the UN Charter are binding on all members of the UN. States are able to determine how to implement the measures adopted by the Security Council, but are not free to determine whether (or not) they implement such measures according to Article 25 of the UN Charter.
16. Its full name is 'the UN Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaeda and the Taliban and associated individuals and entities'.
17. However, it is interesting to note that, while this resolution reiterated some of the provisions that were part of the previously adopted United Nations International Convention for the Suppression of the Financing of Terrorism, it 'omitted other portions of the Convention (such as the explicit reference to other requirements of international law, including the rights due to persons charged with terrorism-related offences, the rights of extradited persons, the requisites of international humanitarian law, and the provisions on judicial dispute settlement)' (Alvarez, 2003, 875).
18. However, some scholars disagree on that point. For example, Wessel (2006, 2) claims that 'irrespective of the fact that the Community is not a member of the United Nations and, hence, not directly bound by the UN Charter, it is 'indirectly' bound by the UN law as in its constituting treaty it has taken over some of its Member States' international competences'. See also Hinojosa Martínez (2008, 340) and Halberstam and Stein (2009).
19. The European Parliament did not play any significant role in the development of the EU's financial sanctions regime, which reflected its marginal position in the CFSP pillar at the time (Eling, 2007; Peers, 2003).
20. Judgment of the Court of Justice in Joined Cases C-402/05 and C-415/05, 3 September 2008.
21. Since the entry into force of the Treaty of Lisbon, the EU's judicial authority has been called the 'Court of Justice of the European Union' and consists of the Court of Justice and the General Court. However, prior to 1 December 2009, the Court of Justice was officially called the 'Court of Justice of the European Communities' (or the 'Court of Justice'), but was often referred to as the 'European Court of Justice' (ECJ), while the General Court was known as the 'Court of First Instance' (CFI). The Court of Justice was responsible for considering the appeals against judgments of the CFI. As the overwhelming majority of the literature on the EU's

financial sanctions regime refers to the ECJ and the CFI, this chapter also uses these acronyms for the sake of clarity.

22. See notably Eeckhout, 2007; Curtin and Eckes, 2008; Hinojosa Martínez, 2008; d'Aspremont and Dopagne, 2008; de Búrca, 2010; della Cananea, 2008–9; De Sena and Vitucci, 2009; Eckes, 2008, 2009; Halberstam and Stein, 2009; Kunoy and Dawes, 2009; Nettesheim, 2007; Tridimas, 2009; Tridimas and Gutierrez-Fons, 2008–9; van den Herik and Schrijver, 2008; Wessel, 2008; and Vlcek, 2007. AQ5 AQ6
23. For its part, the European Commission submitted that it was necessary to adopt EU instruments to ensure a consistent application of the targeted sanctions across the EU territory in order to preserve the free movement of capital within the Community and to avoid distortions of competition. This reasoning was also strongly supported by some member states, such as the United Kingdom, which feared that differences in the application of the freezing of assets among member states would have an impact on free movement of capital in the EU, therefore leading to a risk of distortion of competition (see Judgment of the Court of First Instance, in Case T-315/01, 21 September 2005, paragraphs 73 and 80 in particular).
24. Nevertheless, in paragraph 277 of the judgment, the Court softened this strong stance by declaring itself 'empowered to check, indirectly, the lawfulness of the resolution of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible'.
25. 'May' is used on the basis of Mr Kadi's practical experience. Following the ECJ ruling in September 2008, which had annulled the regulation freezing his funds, the European Commission informed Mr Kadi of the reasons for which he had been listed by the UN 1267 Committee and subsequently adopted a new regulation maintaining the freezing of his funds. The Commission stated that it had complied with the judgment of the ECJ by communicating to Mr Kadi the reasons for his listing and granting him an opportunity to comment on these reasons.

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